Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL J. FRYE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "balancing test" adopted by this Court for evaluation of delays under the Sixth Amendment's Speedy Trial Clause should also be applied to case of preindictment delay as judged by the Due Process Clause

2. Whether the concept of "presumed prejudice" as established in *Doggett* should be applied to preindictment delay cases.

3. Whether the trial court's finding of actual prejudice was clearly erroneous.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MICHAEL J. FRYE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

A Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Appellant, Michael J. Frye respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, entered in this proceeding on May 30, 1996, in order to resolve the conflict between various Circuits regarding the important Constitutional issues presented herein.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit, the United States District Court and the report of the United States magistrate that give rise to this petition are attached to petition for certiorari filed with this Court by the Appellant's co-defendant, A. Guy Crouch as Appendix A. Mr. Crouch's appendix is hereby adopted and incorporated by reference herein.

JURISDICTION

This petition is filed to review the reversal by the Fifth Circuit *en banc* of the District Court's dismissal of an indictment for undue delay.

A panel of the Fifth Circuit had previously affirmed the District Court's dismissal. The judgment of the Fifth Circuit reversing the District Court was entered on May 30, 1996. Jurisdiction lies in this Court by virtue of the United States Constitution and 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The indictment in this case charges the violation of 18 U.S.C. §§ 2, 371, 657, 1006, 1014, 1344. The substance of these provisions is not at issue in this appeal. This appeal rests on an interpretation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

In 1992, the defendants were indicted for bank fraud, conspiracy, misapplication and false entries. These charges arose from transactions that were consummated in 1985. The thrust of the government's case is that the defendants engaged in a series of nominee loans to avoid loans-to-one-borrower limitations.

The transactions charged in the indictment involved a federally insured savings association, Delta Savings. Frye was a real estate developer and not affiliated with Delta Savings in any way. In 1985, a corporation owned by Frye acquired a parcel of real estate from Delta Savings with financing by Delta. The government contends that Frye was a nominee on this loan for another developer, Robert Ferguson. Ferguson had, in fact, solicited Frye as an investor in the property, and Frye and Ferguson entered into a "profit-sharing" agreement with regard to the eventual sale of the property. It is undisputed that a memorandum of the profit sharing agreement between Frye and Ferguson was recorded in the deed records and that Delta's loan documents made specific reference to the profit sharing agreement.

After being charged, Frye and his co-Defendant Crouch, filed motions to dismiss the indictment for undue prosecutorial delay. The District Court referred the motion to the Magistrate, who conducted an evidentiary hearing on the defendants' motion.

At the hearing, the defendants argued, and the Magistrate agreed, that the initial burden rests on them to show prejudice and that once that burden had been discharged, the burden then shifted to the government to justify the delay in bringing the prosecution. The defendants further argued that because of the extraordinary length of the delay that they were entitled to a finding of "presumed" prejudice. In the alternative, the defendants presented a substantial showing of actual prejudice. The evidence of actual prejudice offered by the defendants at the hearing included:

(i) Crouch had met, and freely cooperated, with federal agents who had assured him that he was not a target.

(ii) Crouch had delivered many original documents to the Federal Bureau of Investigation without retaining copies of the documents, again acting under the belief that he was not a target of the investigation.

(iii) Frye had destroyed virtually all of his records regarding the transaction through a routine document destruction when he relocated his offices in 1990. At the time Frye did not know that he was under investigation. The existence of his files on this transaction and their destruction was confirmed by Frye's former secretary and an index card file system that showed what documents had been destroyed. This records were particularly crucial to Frye's defense. The government indicated that it intended to introduce the testimony of a federal bank examiner who had a telephone conversation with Frye about the transaction in 1986. The examiner purportedly was to testify that Frye had admitted to him in the phone conversation that he was acting as a nominee. Frye's secretary testified that Frye made notes of all of his telephone conversations and that these notes were routinely filed in the corresponding business file. Frye argued at the hearing that the lost files would have either contained notes of the conversation that would have refreshed his recollection or there would have been no notes, supporting the inference that the conversation never took place.

(iv) Three key directors of Delta Savings, who participated in the approval of the subject transactions, had died before the indictment.

(v) An unindicted co-conspirator had died before the indictment.

(vi) The testimony of a psychologist that it is impossible for human beings to remember the details of complex business transactions after eight (8) years.

(vii) No copies of the profit sharing agreement were available from any source.

(viii) There was no original of a document that the government alleged had been forged. An FBI agent testified that the FBI document examiners only work with original documents.

(ix) The attorney who prepared the loan documentation testified that his file had been destroyed in a routine document destruction and that he had no independent recollection of the transaction. Additionally, the attorney testified that he could not even recall who was his client.

(x) Frye retained an attorney after Delta Savings began collection procedures. This attorney testified that he had also destroyed his file, he had no independent recollection of his representation of Frye.

(xi) The records custodian of the FDIC testified that the whereabouts of the original documents for Delta Savings was unknown, including critical minutes showing the approval of the subject transactions.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN NOT USING THE "BALANCING TEST" TO EVALUATE PREINDICTMENT DELAY UNDER THE DUE PROCESS CLAUSE.

It is universally agreed that this Court established that the Due Process Clause affords protection from the government's undue delay in bringing an indictment that is, nonetheless, within the applicable statute of limitations. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). It is also universally agreed that these two cases set out that the relevant factors to be considered are (i) the prejudice to the defendant and (ii) the reasons for the government's delay in bringing the prosecution. There has been, however, substantial disagreement over the method to be used to analyze these factors and the parties' relative burdens of proof in such an inquiry.

In this case the defendants contended that *Marion* and *Lovasco* suggest the application of a balancing test as proscribed in post-indictment, Sixth Amendment cases. *Baker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Under this test, the defendants have the initial burden of proving prejudice and once demonstrated, the government must come forward to defend its reasons for delaying the prosecution. The government contended that it had no burden of proof and that the defendants had the burden of proving not only actual prejudice, but also that the government has intentionally delayed the prosecution to gain a tactical advantage.

The *en banc* opinion adopted the government position with the slight enlargement that any bad faith reason (other than to gain a tactical advantage) would trigger Due Process relief. Disagreement over the proper test to be applied has plagued the Circuits and the state courts.[1]

The principal reason that this Court should grant certiorari is to require the application of the balancing test in preindictment delay cases as it has in postindictment cases. There is no substantive distinction between preindictment and postindictment cases with respect to this issue. The *en banc* opinion is frontal attack on the propriety and workability of the balancing test. *Crouch* at 3869-3872. The *en banc* opinion is doctrinal limitation on the balancing test notwithstanding this Court's clear suggest as to its use. "*Marion* makes clear that proof of prejudice is *generally* a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for delay as well as the prejudice to the accused." *Lovasco* at 789 (emphasis added).

The "intentional delay" test proposed by the *en banc* opinion is, in fact, no Due Process protection at all from preindictment delay. This Court has previously noted the difficulties defendants and the courts would have in delving into the government's state of mind and knowledge. *Marion* at 321 n.13, S.Ct. at 464, n.13. The petitioner has found no case since *Marion* where a defendant has succeeded on a preindictment delay claim under the intentional delay test. Absent highly unlikely circumstances (*e.g.*, the testimony of a disgruntled former government agent), the adoption of the intentional delay standard effectively overrules the Constitutional principle of *Marion* and *Lovasco*.

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[1] Professor McCabe ably catalogs the current state of the circuit law with respect to this issue in his petition for certiorari of Mr. Frye's co-defendant, Mr. Crouch recently filed with this Court. That discussion is hereby adopted and incorporated by reference.

II. THE COURT OF APPEALS ERRED IN NOT APPLYING THE CONCEPT OF PRESUMPTIVE PREJUDICE TO PREINDICTMENT DELAY CASES.

This Court has established the concept of "presumptive prejudice" in Sixth Amendment, Speedy Trial cases. *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). The unusual postindictment facts of *Doggett* are indistinguishable from a preindictment delay case. The district court agreed with this proposition and concluded that presumed prejudice should also be applied to cases of extraordinary preindictment delay. "Prejudice is prejudice; it may take many forms, but does not change in substance. If post-accusation delay of eight and one-half years results in a presumption of prejudice, it is difficult to imagine why the eight year pre-accusation delay in this case would not come to the aid of the Defendants Crouch and Frye." 835 F.Supp. at 942.

The *en banc* opinion reversed this finding, again on the doctrinal, nonsubstantive distinction that *Doggett* is a Sixth Amendment case. *Crouch* at 3872-73. Relying entirely on circuit authority, the *en banc* opinion ignores the clear indication of this Court that there is substantial overlap in the Constitutional principles applicable to both fact situations. (*E.g., see Lovasco* at 796, 97 S.Ct. at 2052 n. 19, referring to the delay discussion in Justice Brennan's concurring opinion *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), a Sixth Amendment, Speedy Trial case.) Ironically, when the *en banc* opinion finds it beneficial, it was not reluctant to rely on Sixth Amendment case authority to support its views. " . . . unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not . . . encompass a right not to be tried which must be upheld prior to trial if it is to be enjoyed at all. The same conclusion applies, *a fortiori*, to due process claims of preindictment delay." *Crouch* at 3873-74, *quoting United States v. MacDonald*, 435 U.S. 850, 861, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18 (1978).

III. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S FINDING OF ACTUAL PREJUDICE.

The *en banc* opinion also reversed the district court's finding that the defendants had suffered actual prejudice as a result of the government's delay in bring the prosecution. It is agreed that a district court's finding of fact should only be reversed on appeal if they are "clearly erroneous." This Court has consistently held that "where the evidence would support a conclusion either way and where the trial court has decided it to weigh more heavily for the defendant . . . [s]uch a choice between two permissible views of the weight is not 'clearly erroneous'." *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); *Amadeo v. Zant*, 486 U.S. 214, 225, 108 S.Ct. 1771, 1778, 100 L.Ed.2d 249 (1988) ["We have frequently emphasized that 'where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'."] Ironically, the Fifth Circuit has taken even a harsher view by holding that the trial court's findings are not clearly erroneous unless they are "not plausible in light of the record taken as a whole." *United States v. Alaniz-Alaniz*, 38 F.3d 788, 790 n. 3 (5th Cir. 1994). In fact, Justice Garwood, the author of the *en banc* opinion has recently indicated his own concurrence with this standard. "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *United States v. Zuniga*, 18 F.3d 1254, 1261 (5th Cir. 1994).

As set out above, the magistrate, the trial judge, and the chief judge of the Fifth Circuit and one associate justice have concluded that the defendants have suffered actual prejudice by the delay in this case. The defendants, recognizing the substantial burden that foregoing cases had placed on them, presented specific and voluminous evidence of prejudice. The hearing before the magistrate lasted for an entire day and involved nine witnesses and hundreds of pages of documents. The fact that the *en banc* opinion requires five pages and twelve footnotes to dispute that there has been any actual prejudice is the best indication that the finding was "plausible in light of light of the record read as a whole."

The *en banc* opinion's reversal of the trial court's finding of actual prejudice has two detrimental effects. First, it seriously undermines the "clearly erroneous" standard. If this standard merely is a subjective "length of the Chancellor's foot" (to use Judge Garwood's analogy), then it becomes a meaningless tool for judicial manipulation to achieve predetermined results. Also, there will never be a better showing of actual prejudice than the record in this case. Never before, have defendants mounted such a detailed, specific and documented showing of prejudice. Recognizing, as the courts frequently have, the limitations in proving prejudice in the first place, if these defendants have not cleared the bar, no one ever will. Therefore, once again, the *en banc* opinion has practically eliminated any Due Process protection against preindictment delay.

CONCLUSION

The Fifth Circuit's *en banc* opinion, while paying lip service to *Marion* and *Lovasco*, make the protection alluded to therein an impossible dream. By holding (i) that the defendant must prove bad intentions by the government, (ii) that a defendant may not rely on presumed prejudice regardless of the length of the delay and by (iii) finding that the facts of this case do not even support a finding of actual prejudice, the Fifth Circuit has, as a practical matter, overruled the principle of *Marion* and *Lovasco* that the Due Process Clause provides some protection from preindictment delay. The Petitioner respectfully requests that this Court grant this petition of a writ of certiorari for the purpose of clearly defining the rights that are afforded by the Due Process Clause in cases of preindictment delay.

Respectfully submitted this 22d day of August, 1996.

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